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ASM DEVELOPMENT SDN BHD v. BADAN PENGURUSAN BERSAMA LINGKARAN MAJU

HIGH COURT MALAYA, KUALA LUMPUR
SAHERAN SUHENDRAN JC
[ORIGINATING SUMMONS NO: WA-24NCC-316-07-2024]
B 18 NOVEMBER 2024

Abstract – *When a company is in severe financial distress, and there is an absence of an extant scheme of arrangement which feasibility is respectably arguable, a company would be considered as irreversibly insolvent. With no light at the end of the tunnel, and in the interests of its creditors, the company should be wound up. The company should not be allowed to continue to burn whatever cash or assets that remain, which in reality belonged to the creditors. It would be against commercial morality and public policy to sanction a scheme of a hopelessly insolvent company, allowing it to continue trading and to incur more debt.*

COMPANY LAW: *Scheme of arrangement – Convening order – Application for order convening scheme meetings of selected creditors for purpose of approving scheme of arrangement – Whether there was insufficient financial disclosure for creditors to fully consider scheme – Whether respectably arguable that scheme was feasible – Whether scheme had reasonable prospect of being sanctioned under s. 366(4) of Companies Act 2016 – Whether unnecessary to make convening order to put doomed scheme to creditors*

Enclosure 1 was the application of the applicant ASM Development Sdn Bhd ('ASM') for, *inter alia*, an order convening ('convening order') scheme meetings ('scheme meetings') of selected creditors ('scheme creditors') under s. 366 of the Companies Act 2016 ('CA 2016'). The scheme meetings were for the purpose of attending creditors approving a scheme of arrangement ('the scheme') between ASM and its scheme creditors. Prayer 1 sought liberty to convene the scheme meetings, prayers 2 to 6 sought ancillary orders as to the manner in which the scheme meetings were to be held and prayer 7 sought restraining orders under s. 368. The latest iteration (undated) of the scheme ('scheme paper'), at para 5.5 of the scheme paper, the creditors of ASM and their debts were generically stated to be to third party creditors, consultants and contractors as well as related parties. There were also excluded liabilities which were priority creditors comprising various statutory creditors ('the priority creditors') and debts to local authorities ('priority debts'). In addition, there were several extant legal proceedings against ASM, including two winding-up petitions filed by Badan Pengurusan Bersama Lingkaran Maju ('LM') and Tenaga Nasional Berhad, respectively. Also, there were several suits commenced against ASM by contractors, management bodies, and statutory bodies. ASM maintained that the scheme

was fair and reasonable for various reasons, including that, *inter alia*, (i) the scheme was drafted under the close supervision and advice of ASM's Board of Directors and consultants; (ii) the material terms, purpose and rationale of the scheme were sufficiently explained for the consideration of the creditors; (iii) there had been full and frank disclosure of ASM's financial, legal and commercial status; (iv) ASM could raise enough money to discharge the debts of the scheme creditors; (v) the scheme maximises repayment to the scheme creditors; and (iv) the scheme would also maximise value to the shareholders by maintaining ASM as a going concern and to ensure that ASM's businesses remained intact. ASM claimed that a creditor would reasonably approve the scheme as the scheme would maximise recovery for the scheme creditors in a more effective and in a shorter time than in a liquidation of ASM. By encl. 17, LM applied to intervene in these proceedings and to resist encl. 1. LM opposed the convening application in encl. 1 and ASM's scheme itself on the following grounds: (i) that there was insufficient financial disclosure for creditors to fully consider the scheme. This included a 'winding up comparison report' or more commonly termed 'liquidation scenario analysis' which would ordinarily show that returns under the scheme are better than returns in a liquidation. Otherwise, the scheme would be futile; (ii) the scheme was not feasible. Feasibility was not ordinarily considered at this convening stage. However, feasibility may be in issue if feasibility is not 'respectably arguable' and that it has no prospect of success. LM argued that: (i) the alleged sales recovery in the liquidation scenario analysis was wholly unjustified as it was not based on any credible valuation. Its timeframe was unachievable; (ii) the alleged recovery from related companies was subject to undisclosed completion of the restructuring of those related companies; (iii) the scheme proposed to illegally repay related company creditors in priority to creditors otherwise afforded priority in law; and (iv) there could not be, without a fresh injection of capital, a feasible business plan nor any plan to revive ASM as a going concern.

Held (dismissing prayers 1, 2, 3, 4, 5, 6, 7 and 8):

(1) The financial disclosure must necessarily comprise up-to-date information of the financial affairs of ASM. So, there must be disclosure of the latest financial status of ASM. This was the starting point in the analysis. There were no management accounts for the quarter ended 30 September 2024 to show the true current financial status of ASM. There was only an unverified statement that ASM had debts of RM199,937,346.41 as of May 2024. It was impossible to conclude that all the debts of ASM would be settled post scheme. These contradictory statements of the outstanding debts and the amounts to be settled did not lend any credibility to the financial information disclosed. There were also 'excluded' creditors who were the priority creditors and the fees

A and expenses in relation to the scheme. These debts were not identified nor was there any projected cash flows to justify that these payments to excluded creditors would be met (paras 36-41)

(2) It was necessary to consider the alternative scenario ('comparator') which would occur in the event that the scheme in question failed. The B comparator may not be a liquidation but, as an example, it may be a managed sell down of the assets. In this case, it appeared from the advice of the financial adviser, that in the event the scheme failed, the comparator would be a liquidation of ASM. The returns that the scheme creditors would realistically obtain from the scheme when compared C with the returns in a liquidation was also commonly called the 'liquidation scenario analysis'. The need for a liquidation scenario analysis where the comparator is a liquidation, was critical. So, insufficient analysis would be fatal. No detailed analysis was provided as to the estimated returns under the scheme and the estimated returns D in a liquidation, and the basis for such estimates. Without such an analysis, it would be difficult for a court to convene scheme meetings for the creditors to consider the scheme in question. This court could not possibly 'act' by granting the convening and restraining orders when ASM had failed to even show any detailed analysis to justify the E assertion that the scheme provided better returns than in a liquidation. It would be pointless to grant such orders in these circumstances. And it would be unnecessary to make a convening order to put a doomed scheme to the creditors. (paras 42-48)

(3) A business plan was essential to revive ASM. The existing business had F long ceased and had spent the last few years bleeding creditors funds. There was no such plan. This was a major flaw. There was no proposal with particulars as to how ASM was to be revived. Even though ASM was severely insolvent, ASM did not propose a fresh injection of new capital. There were no post scheme financial projections. There was no G proforma post scheme balance sheet showing that ASM would be balance sheet solvent after the scheme was implemented. There were no projected cash flows to show that ASM would be able to raise sufficient internally generated cash flow to meet its restructured debt and operating expenditure. The scheme could not possibly be put before the creditors. (paras 49-51)

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(4) It was not respectably arguable that the scheme was feasible, nor did it have a reasonable prospect of being sanctioned under s. 366(4). Given ASM's severe financial distress and the absence of an extant scheme which feasibility is respectably arguable, ASM would probably be I considered as irreversibly insolvent, with no light at the end of the tunnel. In the interests of its creditors, ASM should be wound up. To allow matters to remain would mean that ASM would continue to burn

whatever cash or assets that remain, which in reality belonged to the creditors. More importantly, it would be against commercial morality and public policy to sanction a scheme of a hopelessly insolvent company, thus allowing it to continue trading and to incur more debt. (paras 77-80)

Case(s) referred to:

Airasia X Bhd v. BOC Aviation Ltd & Ors [2021] CLJU 188; [2021] 1 LNS 188 HC ***(refd)***
Damai City Sdn Bhd v. Grand Dynamic Builders Sdn Bhd & Ors [2024] 5 CLJ 467 HC ***(refd)***
Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals [2014] 1 CLJ 161 FC ***(refd)***
KNM Group Bhd v. Ann Joo Metal Sdn Bhd [2024] CLJU 1250 HC; [2024] 1 LNS 1250 HC ***(refd)***
Lagenda Erajuta Sdn Bhd v. Acre Square Sdn Bhd & Ors [2020] CLJU 698; [2020] 1 LNS 698 HC ***(refd)***
Novabrite Lighting Sdn Bhd v. Emrail Sdn Bhd; Balaranee Construction (Proposed Intervener) [2024] CLJU 2554; [2024] 1 LNS 2254 HC ***(refd)***
Re AGPS BondCo Plc [2024] EWCA Civ 24 ***(refd)***
Re Amicus Finance Plc (In Administration) [2021] EWHC 2255 ***(refd)***
Re Indah Kiat International Finance Company BV [2016] EWHC 246 ***(refd)***
Re Kuala Lumpur Industries Bhd [1989] CLJU 150; [1989] 1 LNS 150 HC ***(refd)***
Re Noble Group Ltd (No 1) [2019] 2 BCLC 505 ***(refd)***
Re Port Finance Investment Ltd [2021] EWHC 378 ***(refd)***
Re Stronghold Insurance Co Ltd [2019] 2 BCLC 11 ***(refd)***
Re Telewest Communications Plc (No 1); Re Telewest Finance (Jersey) Ltd (No 1) [2005] 1 BCLC 752 ***(refd)***
Sri-Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(refd)***
Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors [2012] 9 CLJ 1071 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 366(4), 368(1A), 369, 527(b), (e), (f)

For the applicant - Nakeeran Kumar Kanthavel; M/s Jasbeer, Nur & Lee
For the proposed intervener - YK Leong; M/s Leong Yeng Kit & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Saheran Suhendran JC:

Introduction

[1] Enclosure 1 is the application of the applicant ('ASM') for, *inter alia*, an order convening ('the convening order') scheme meetings ('the scheme meetings') of selected creditors ('scheme creditors') under s. 366 of the Companies Act 2016 ('CA 2016'). The scheme meetings are for the purpose of attending creditors approving a scheme of arrangement ('the scheme') between ASM and its scheme creditors.

[2] Prayer 1 seeks liberty to convene the scheme meetings, prayers 2 to 6 seek ancillary orders as to the manner in which the scheme meetings are to be held. Prayer 7 prays for restraining orders, I assume, under s. 368.

[3] On 13 July 2024 and in tandem with prayer 7 of encl. 1, ASM filed encl. 3 also seeking a restraining order for a period of three months.

[4] On the filing of encls. 1 and 3, the new amendments to CA 2016, specifically, s. 368(1A), provided for an automatic moratorium ('RO1') of two months from 13 July 2024 expiring on 13 September 2024.

[5] Given the impending expiry, I granted an interim restraining order ('RO2') under prayer 1 of encl. 3 for three months expiring on 13 December 2024.

[6] By encl. 17, Badan Pengurusan Bersama Lingkaran Maju (JMB907/2017) ('LM') applied to intervene in these proceedings and to resist encl. 1. I granted LM an order to intervene.

Background Facts

[7] On 19 October 1990, ASM was incorporated under the Companies Act 1965 ('CA 1965') as a private company limited by shares.

[8] The latest iteration (undated) of the scheme is exhibited as ex D-1 ('the scheme paper') in encl. 23, which was affirmed on 10 September 2024). At para 5.5 of the scheme paper, the creditors of ASM and their debts are generically stated to be:

(i) RM6,355,617.59 - third party creditors;

(ii) RM37,510,209.84 - consultants & contractors;

(iii) RM12,472 - related party (Maju Rail S/B);

(iv) RM146,624,459 - related party (Maju Holdings S/B); and

RM184,147,141 - total (approximately).

[9] There are also excluded labilities (ex A-5 at p. 1135 of encl. 2, affirmed on 12 July 2024) which are priority creditors comprising various statutory creditors ('the priority creditors') such as the IRB, EPF and debts to local authorities ('priority debts'). These are said to include:

(i) employees, about RM70,000;

(ii) EPF, about RM357,000;

(iii) IRB, about RM11.794 million; and

(iv) DBKL, about RM1.587 million and the land office, about RM240,000.

[10] However, it appears that this may not be the complete list.

[11] Based on the latest available audited accounts for the year ended 31 December 2022, ASM's total liabilities were RM199,937,346.41. This figure does not appear to match the sum stated in the scheme paper.

[12] In addition, there are several extant legal proceedings against ASM, including two winding-up petitions filed by LM and Tenaga Nasional Berhad, respectively. Further, IRB obtained a judgment against ASM and has also commenced winding up proceedings which were served on 22 August 2024. Also, there are several suits commenced against ASM by contractors, management bodies, and statutory bodies.

ASM Extols The Scheme In Enclosure 2

[13] ASM claims that there is a good chance for ASM's business to recover after implementation of the scheme.

[14] ASM maintains that the scheme is fair and reasonable for various reasons, including that:

(i) the scheme was drafted under the close supervision and advice of ASM's Board of Directors and consultants;

(ii) the scheme creditors are identified and the classification of the scheme creditors, sufficiently explained;

(iii) the material terms, purpose and rationale of the scheme are sufficiently explained for the consideration of the creditors;

(iv) there has been full and frank disclosure of ASM's financial, legal and commercial status;

(v) ASM can raise enough money to discharge the debts of the scheme creditors;

(vi) the scheme maximises repayment to the scheme creditors;

(vii) the scheme allows ASM to continue its operations whilst settling existing liabilities;

(viii) the scheme ensures that ASM's profits and potential be gradually restored without unnecessary obstruction from creditors;

(ix) ASM has outlined the timeline of the scheme;

(x) ASM has explained the approvals required for the formalisation of the scheme and *bona fide* disclosed all the directors' interests;

(xi) the scheme provides that third party scheme creditors would recover 100% of their debts, while related party scheme creditors would receive 30%; and

(xii) finally, the scheme will also maximise value to the shareholders by maintaining ASM as a going concern and to ensure that ASM's businesses remain intact.

[15] ASM claims that a creditor would reasonably approve the scheme as the scheme would maximise recovery for the scheme creditors in a more effective and in a shorter time than in a liquidation of ASM.

The Role Of The Court

[16] Before examining LM's challenges to the scheme and convening order, I should first examine the role of the court at the convening stage.

[17] In *Airasia X Bhd v. BOC Aviation Ltd & Ors* [2021] CLJU 188; [2021] 1 LNS 188; [2021] MLJU 189, Ong Chee Kwan JC (as he then was) (Ong J) summarised the position relying on the explanation by Hildyard J in *Re Stronghold Insurance Co Ltd* [2019] 2 BCLC 11 at 18 to 19, paras. [31] to [32]. His Lordship said:

> [39] So, at the Convening Stage, the Court is to deal only with the jurisdictional issues and should leave the issues with discretionary or value judgment at the Sanction Stage. Also, the decisions made at this stage do not bind the Court at the Sanction Stage.

[18] It is trite that the merits of the scheme (going to fairness and feasibility) will, generally, not be decided at the convening hearing. As explained by Ong J, this is a matter that goes to the exercise of discretion and should be left to the sanction stage. David Richards J (as he then was) set the standard in *Re Telewest Communications Plc (No 1); Re Telewest Finance (Jersey) Ltd (No 1)* [2005] 1 BCLC 752 at para. 14 (which has been continuously followed) and which I gratefully adopt:

> [14] In considering the primary position of the opposing bondholders, it is important to keep in mind the function of the court at this stage. This is an application by the companies for leave to convene meetings to consider the schemes. It is emphatically **not a hearing to consider the merits and fairness** of the schemes. Those aspects are among the principal matters for decision at the later hearing to sanction the schemes, if they are approved by the statutory majorities of creditors. The matters for consideration at this stage concern the **jurisdiction** of the court to sanction the scheme if it proceeds. There is no point in the court convening meetings to consider the scheme if it can be seen now that it will lack the jurisdiction to sanction it later.
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> (emphasis added)

[19] Apart from jurisdictional issues, it is also open to the court to consider factors which will prevent a court from sanctioning the scheme, commonly termed 'roadblocks'. In *Re Noble Group Ltd (No 1)* [2019] 2 BCLC 505, Snowden J (as he then was) said:

> [76] What I do think that a scheme company can legitimately ask at the convening stage is for the Court to indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are **other factors which would unquestionably lead the Court to refuse to exercise its discretion to sanction the scheme**. This is often described as the question of whether there is a '**roadblock**' in the way of the Company. That was, I think, the real thrust of the points being made by David Richards J in T&N and by Hildyard J in Apcoa (No 1).

[20] Miles J took a more nuanced approach to 'roadblocks'. In *Re CB & I UK Ltd* [2023] EWHC 2497 (Ch) 56, he held:

> I turn to the question of whether there are any other jurisdictional roadblocks that might stand in the way of a convening order. The question here is whether it is obvious that the court has no jurisdiction to sanction the plan, or whether there are **other factors which would unquestionably lead the court to refuse to exercise its discretion to sanction the plan**. It appears to me that **if there are points which appear** to be at least **respectably arguable** by the Plan Company, the court will not regard those at this stage as amounting to a relevant **roadblock**.
>
> (emphasis added)

[21] One such 'roadblock' would be if more than 25% of the creditors in any class undeniably refuse to approve the scheme whereby the scheme would be bound to fail. Mohd Arief Emran Arifin J dealt with this point in *Damai City Sdn Bhd v. Grand Dynamic Builders Sdn Bhd & Ors* [2024] 5 CLJ 467; [2024] MLJU 633 at paras. [20] to [23]. And did Atan Mustaffa J in *KNM Group Bhd v. Ann Joo Metal Sdn Bhd* [2024] CLJU 1250 (OS NO: WA-24NCC-643-11-2023 (8 April 2024)) (broad grounds) at paras. [39] to [55].

[22] More importantly, Atan Mustaffa J in *KNM Group Bhd* (*supra*) followed Liza Chan J's assessment of a virtually identical scheme where the monetisation of assets was critical to the success of the scheme. His Lordship found that, on the facts, the monies to be raised were insufficient to meet the scheme debts. A convening order was refused as the scheme had no realistic prospect of success or was doomed to fail. In that sense, the feasibility of the scheme could, to a limited extent, be examined at the convening stage to determine whether there was no prospect of success. In contrast, if the scheme's feasibility is challenged but feasibility remains 'respectably arguable' within Miles J's test in *Re CB&I UK Ltd* (*supra*), then it would not be considered a roadblock.

[23] However, the general rule remains: once the commercial aspects of the scheme are voted on by the creditors, feasibility and fairness are discretionary issues to be examined by the court at sanction see paras. 17 and 18 above. But if fairness and feasibility are not 'respectably arguable', then it would be unnecessary to put the scheme to the creditors at the scheme

meetings. The convening order could be refused on this basis. It is in this context that the earlier decisions which considered feasibility at the convening stage, are best explained. 'Feasibility' in this context means that there is sufficient evidence that feasibility is 'respectably arguable' to merit the scheme being put to the creditors, see for example, *Re Kuala Lumpur Industries Bhd* [1989] CLJU 150; [1989] 1 LNS 150; [1990] 2 MLJ 180, where VC George J (as he then was) held:

> In my view, what must be available to the court when considering a s. 176(10) application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with **sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors** when it is eventually placed before them in detailed form.
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> (emphasis added)

[24] The approach which means feasibility has to be shown at the convening stage (*albeit* at a lower standard), may be said (in contrast to David Richards J's apparently emphatic prohibition against considering feasibility at para. 18 above), to be too strict and 'anti-scheme' by being unduly restrictive. However, if this approach is indeed stricter, it is necessary to ensure that only genuine schemes are the subject of a s. 368(1) filing. The automatic moratorium that now arises on the mere filing of a s. 368(1A) application, must be protected against abuse by proposing frivolous schemes predominantly designed to stave off creditors.

LM'S Challenges

[25] LM opposes the convening application in encl. 1 and ASM's scheme itself on the following grounds. I have taken the liberty to reformulate some of the objections taken.

[26] First, it is said that there is insufficient financial disclosure for creditors to fully consider the scheme. This includes a "winding up comparison report" or more commonly termed "liquidation scenario analysis" which will ordinarily show that returns under the scheme are better than returns in a liquidation. Otherwise, the scheme would be futile.

[27] Secondly, the scheme is not feasible. As stated above, feasibility is not ordinarily considered at this convening stage. However, feasibility may be an issue if feasibility is not 'respectably arguable' and that it has no prospect of success. LM argues that:

(i) the alleged sales recovery in the liquidation scenario analysis is wholly unjustified as it is not based on any credible valuation. Its timeframe is unachievable;

(ii) the alleged recovery from related companies is subject to undisclosed completion of the restructuring of those related companies;

(iii) the scheme proposes to illegally repay related company creditors in priority to creditors otherwise afforded priority in law; and

(iv) there cannot be, without a fresh injection of capital, a feasible business plan nor any plan to revive ASM as a going concern. I will deal with some of these complaints.

Financial Disclosure

[28] A common approach to determine whether there has been adequate disclosure at the convening stage is to ask whether there is sufficient information to enable the creditors to make an informed decision when they vote. With respect, this is an error. The duty to ensure that there is adequate information placed before the creditors at voting, is to ensure that disclosure in the explanatory statement ('ES') issued pursuant to s. 369 is adequate.

[29] In the UK, there is a practice to disclose a draft ES to the court at the convening stage. This is required by para. 15 of the practice statement (companies: schemes of arrangement under Pt 26 and Pt 26A of the Companies Act 2006). This practice suggests that there must be comprehensive disclosure at the convening hearing. However, it appears that all that is required is a draft indicating the sort of information or components that one would expect to see in an ES. In *Re Port Finance Investment Ltd* [2021] EWHC 378 (Ch), Snowden J (as he then was) explained the need for a draft ES under the practice statement. He said:

> 109. Paragraph 15 of the **Practice Statement** requires the Court to consider the adequacy of the Explanatory Statement. As I explained in *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch), [2020] BCC 926, [123]:
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> > The reference to the court "considering the adequacy" of the explanatory statement is not intended to suggest that the court will generally do anything other than to ascertain that the **essential elements which it would expect to see in an explanatory statement are present**. If they are not, or if the form of the statement is for some other reason obviously unsuitable, the court may decline to make a meetings order: see *eg*, *Re Indah Kiat International Finance Co BV* [2016] BCC 418. As the New Practice Statement goes on to makes clear, however, what the court will most assuredly not do is to approve or give its imprimatur to the contents or accuracy of the explanatory statement. ...
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> 111. However, as a result of various amendments made over the course of the three hearings, I was satisfied that the draft Explanatory Statement contained the necessary **components** and is in a **comprehensible form**.
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> (emphasis added)

[30] This practice statement has no application in Malaysia as acknowledged by Ong J in *Air Asia X* (*supra*) at para 69. But in any event, the draft ES is limited to the 'components' of information needed to be disclosed.

[31] The general duty of disclosure at the convening stage (apart from the practice statement) is as stated by Snowden J in *Indah Kiat* (*supra*), being to disclose sufficient information to persuade the court 'to act'. In our case, 'to act' means to make the convening and restraining orders. This is the duty applicable in Malaysia. In *Air Asia X* (*supra*), Ong J held, citing *Indah Kiat* (*supra*):

> [66] In connection with the Court's role in determining the jurisdictional issues at the Convening Stage, it is incumbent upon the scheme company to adduce evidence of sufficient quality to persuade the Court to act on the scheme and it has a duty to make full and frank disclosure of all relevant facts and matters to the Court relevant to such **jurisdictional issues including the classification of creditors**.
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> [67] In *Indah Kiat International Finance Company BV* [2016] BCC 418 ('*Indah Kiat*'), Snowden J explained the duty of disclosure in this manner:
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> > 39. ... As I have indicated above, the only issues that are generally appropriate to be considered at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or **would unquestionably refuse to sanction** the scheme.
> >
> > 40. But the court is not bound to accept at face value bare assertions in the evidence in relation to class composition or any other matter. At the convening hearing, the applicant company has the burden of adducing evidence of sufficient quality and credibility to **persuade the court to act**. Further, and importantly, whether or not there is any opposition, the company proposing a scheme of arrangement has a duty to make full and frank disclosure to the court of all material facts and matters which may be **relevant to any decision that the court is asked to make**. The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court.'
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> [68] Sundaresh Menon CJ in *Pathfinder* described the duty of disclosure at the Convening Stage thus:
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> > 50. However, we must emphasise that even this **less onerous standard of disclosure at the leave stage** is not wholly without bite, and there remains a minimal standard of disclosure that a company must satisfy before leave will be granted under s. 210(1) of the CA. ... existing jurisprudence makes clear that at the leave stage, the company bears a duty of unreserved **disclosure** to assist the court in determining whether and how the creditors' meeting is to be conducted. This must be taken to require at least such disclosure as would enable the court to determine the issues that it must properly consider at this stage, such as the classification of creditors, the **proposals realistic prospects of success**, and any allegation of abuse of process.

> 51. In our judgment, the balance between the company's desire to table a proposal, the creditors' right to consider such a proposal, and the court's overriding duty to ensure the proper exercise of its statutory powers, is correctly struck by requiring, in addition, that the company provide **such financial disclosure** by the leave stage in such manner and to such extent as is reasonably necessary for the court to be satisfied that fair conduct of the creditors' meeting is possible.
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> 52. We consider this formulation to be justified in principle. As an aspect of the company's duty of disclosure at the leave stage, it should not be applied in a manner that is particularly onerous or exacting. The leave application is, after all, usually heard in an expedited basis ... But this does not mean that the duty is a hollow one, and the court should not be taken as a rubber stamp just because the proposed scheme would likely return to the court at the sanction stage. By that stage, if an unsuitable creditors' meeting had been convened in the interim, it is likely that valuable time and resources would have been spent, positions crystalised, the financial situation deteriorated and serious distrust engendered, all of which may be fatal to any prospective rehabilitation of the company while also being unfairly prejudicial to the creditors ... .
>
> (emphasis added)

[32] In the context of feasibility and following *Pathfinder* and the Malaysian cases at paras. 21 and 22 above, there must, therefore, be sufficient evidence of ASM's financial affairs to allow the court, without actually deciding feasibility, to determine if the scheme has a realistic prospect of success and not doomed to fail. Or, as Miles J put it, that the feasibility of the scheme is 'respectably arguable'.

[33] Sufficient information is also required (as explained by Snowden J in Indah Kiat above) to determine the jurisdictional issues such as classification. Ong J in *Air Asia X* held at para. 70:

> [70] To my mind, whilst the Court should not generally be considering the merits or fairness of the proposed scheme at the Convening Stage as these are issues that should be left for the creditors to decide, nevertheless, there must be sufficient particulars to enable the Court to determine the jurisdictional related issues.

Information Of The Current Financial Status Of ASM

[34] The disclosure by ASM in its affidavits as stated below, is however, selective. What is obvious is that ASM is severely insolvent:

(i) as at year ended 31 December 2022, ASM had negative shareholders' funds of RM29millon (see the admission in cl. 4 of the previous draft scheme in ex C-1, encl. 20, at p. 17);

(ii) it is not disputed that ASM has been 'haemorrhaging' cash since it ceased operations in 2018. For the year ended 31 December 2022, it suffered a loss of RM3.6million (see audited accounts for year ended 31 December 2022 ("AA 2022") exh. A-4, encl. 2, p. 79);

(iii) for the year ended 31 December 2022, ASM only had RM85,000 in cash (see AA 2022 at exh. A-4, encl. 2, p. 87). There is no information as to any monies it may currently have;

(iv) ASM has considerable debts of RM199,937,346.41 as of May 2024 (see statement of creditors at exh. A-5 encl. 2 at p. 135). From this figure it is significant to note that ASM owes the priority debts (as stated above at para. 7);

(v) ASM owes RM1.488 million to LM for maintenance fees unpaid under the Strata Management Tribunal Awards duly registered with the court (see, ex B-1, encl. 18, pp 17-22). As of September 2024, ASM has an accumulated maintenance debt of RM6,140,292.86 increasing by about RM60,000 every month going forward (see statement of accounts at ex B-4, encl. 33, pp. 36 to 39);

(vi) while ASM claims to have book assets of RM391 million (see para. 5.1 of the scheme paper, there is no evidence to substantiate this. This figure does not match AA 2022 at encl. 2, p. 87;

(vii) ASM is currently facing three winding up petitions by LM, TNB and LHDN (see cl. 3, ex C-1, encl. 20, p. 17);

(viii) ASM has failed to apply for and obtain strata titles for the proprietors of Lingkaran Maju;

(ix) ASM admits that it had ceased operations since 2018 and that it has not earned any revenue since then. The Tower Block in Lingkaran Maju itself has been abandoned since 2018 (see the admission in Cl 4, encl. 20, p. 17); and

(x) ASM admits that it is insolvent and is unable to pay its debts as and when they fall due (see para. 15 of encl. 2). ASM also states that its cash flow is "inconsistent with its liabilities at this point in time". I take this to mean that ASM's generated cashflow cannot meet its liabilities.

[35] ASM is in deep financial trouble, without a business and without any disclosed plan for rehabilitation.

Full disclosure Of Current Financial Status

[36] The above disclosure is insufficient.

[37] First, the financial disclosure must necessarily comprise up-to-date information of the financial affairs of ASM. In *Lagenda Erajuta Sdn Bhd v. Acre Square Sdn Bhd & Ors* [2020] CLJU 698; [2020] 1 LNS 698; [2020] MLJU 789, it was held that:

> [20] The non-disclosure complained of in this instance was threefold: ...
>
> (2) Non-disclosure of the latest statements of assets and liabilities, *inter alia*, stating inaccurate or exaggerated figures as to the liabilities of scheme creditors for an ulterior purpose; and ...
>
> [21] Having scrutinised the facts and issues raised on this point, in my finding, the contention of the PIs that by not fully disclosing the true and fair state of affairs of the Applicant, the Court was misled into believing that it was necessary to grant the Restraining Order based in the figures presented by the Applicant should be upheld. **Without the disclosure of the actual figures of the Applicant's assets and liabilities to the Court**, the proposition that the *Ex-Parte* Order ought not to have been granted in the first place (*In Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194, 205-207 referred to) merited careful consideration.
>
> (emphasis added)

[38] So, there must be disclosure of the latest financial status of ASM. This is the starting point in the analysis.

[39] In this regard, apart from AA 2022, there are no audited accounts for the year ended 2023. There are no management accounts for the quarter ended 30 September 2024 to show the true current financial status of ASM. There is only an unverified statement that ASM has debts of RM199,937,346.41 as of May 2024 (see ex A-5 encl. 2, at p. 135).

[40] This is odd as the total debts to be settled as stated in para 5.54 of the scheme paper are third party creditors of RM37,510,209.84 and related party creditors of RM146,636,931. However, at para. 5.3 of the scheme paper, the amounts to be settled under the scheme total RM81.49 million and comprise third party creditors of RM37.5 million and related company creditors of RM43.99 million. It is impossible to conclude that all the debts of ASM will be settled post-scheme.

[41] These contradictory statements of the outstanding debts and the amounts to be settled do not lend any credibility to financial information disclosed. There are also "excluded" creditors who are the priority creditors and the fees and expenses in relation to the scheme. It is said in para 5.4 of the scheme, that these will be paid from the project. These debts are not identified nor are there any projected cash flows to justify that these payments to excluded creditors will be met.

Liquidation Scenario Analysis

[42] Secondly, and perhaps most importantly, it is necessary to consider the alternative scenario ('the comparator') which would occur in the event that the scheme in question fails. The comparator may not be a liquidation but, as an example, it may be a managed sell down of the assets, see *Re Amicus Finance Plc (In Administration)* [2021] EWHC 2255 at para. 55 and as explained by Snowden LJ in *Re AGPS BondCo Plc* [2024] EWCA Civ 24 referred to in para. 57 below. This is a question of fact.

[43] A financial advisor or an insolvency practitioner would then prepare an analysis comparing the estimated returns under the scheme with the estimated returns in the scenario of the comparator. This is sometimes called an 'estimated outcome statement'. It is obvious that the returns under the scheme must be better than that under the comparator, otherwise, pursuing the scheme would be pointless.

[44] In our case, it appears from the advice of the financial adviser, Steve & Co Capital Sdn Bhd ('Steve & Co') in a letter dated 9 September 2024 (at para. 4 of encl. 24 at p. 341) that in the event the scheme fails, the comparator would be a liquidation of ASM. The returns that the scheme creditors would realistically obtain from the scheme when compared with the returns in a liquidation is also commonly called the "liquidation scenario analysis".

[45] The need for a liquidation scenario analysis where the comparator is a liquidation, is critical. In *Re Indah Kiat International Finance Company* BV [2016] EWHC 246 (Ch) Snowden J, as he then was, described the need for a liquidation scenario analysis (which was referred to therein as a "fairness report"). He held:

> 70. As well as the Supporting Creditor, APPIO's other major concern about the Explanatory Statement and the scheme documentation to be sent to scheme creditors concerned the **portrayal of the alternatives to the scheme**.
>
> 71. In *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046, I observed, at paragraph 24:
>
> > I would, however, indicate for the future that companies that **seek the consent of their creditors** and the sanction of the court to a scheme of arrangement that is put forward as **a more advantageous outcome for creditors than formal insolvency proceedings** may be well advised to ensure that **greater detail** is provided, both in the explanatory statement and in the **evidence before the court**, as to the possible alternatives to the scheme and the basis for the predicted outcomes. The provision of such information is likely to be **essential** if there is a challenge to the scheme.

72. In the instant case, that information is purportedly provided in the letter from Mr. Smotlak to scheme creditors to which I have referred, and in the "**Fairness Opinion**" obtained by the scheme Company and the Parent from FTI Consulting. Mr. Smotlak's letter asserts that alternatives to the scheme include (i) a consensual arrangement and (ii) the scheme Company and the Parent entering into formal insolvency proceedings in the Netherlands and/or Indonesia. ...

73. ... He also suggests that they might institute enforcement action or formal insolvency proceedings against the scheme Company and/or the Parent. Mr. Smotlak's letter then concludes:

> Having considered the potential alternative strategies, the scheme Company, the Board and the board of directors of the Parent have concluded that commencing **Insolvency Proceedings** in respect of the scheme Company and/or the Parent **would not be in the best interests of the scheme Company**, the scheme creditors, the Parent, the APP Group as whole, or any creditors and shareholders of the Parent. Rather, the scheme Company, the Board and the board of directors of the Parent believe the implementation of the scheme offers the best prospects for the scheme Company and the Parent and their group companies in the light of prevailing circumstances. Ultimately, the scheme Company, the Board and the board of directors of the Parent believe that the scheme offers holders of the Notes the best prospects of allowing the scheme Company, the Parent and the APP Group to continue to carry on its business as a going concern and of scheme creditors obtaining any enhanced recovery of the debt outstanding under the Notes.

74. As regards the outcome of formal insolvency proceedings, the Fairness Opinion contains an **analysis of the likely returns to scheme creditors** if the scheme Company and the Parent were to go into **liquidation**. It concludes that such returns would be lower than the likely returns under the scheme and ends with the following opinion:

> In our view, it is in the interests of the holders of the existing Notes, [the Parent], the APP Group and their respective stakeholders to proceed with the restructuring based on the proposed restructuring terms contained in the term sheet.

75. Miss Toube **criticises this material** for not presenting any **analysis or evidence** as to whether the scheme Company, or more importantly, the Parent, **would** actually be forced into formal insolvency proceedings if the scheme were not approved. She points out that nowhere in the documentation is there any statement or analysis to that effect, nor even any admission or acknowledgement by the Parent that it is insolvent and unable to pay its debts, or that it would be in the absence of the scheme.

76. As regards the Parent's financial position, the consolidated unaudited financial statements of the Parent and its subsidiaries as at 30 September 2015 show total assets of US$6.65 billion and total liabilities of US$4.07

> billion - a net surplus of US$2.58 billion. Current assets of US$1.77 billion also comfortably exceed current liabilities of US$1.31 billion. The performance of the business over the nine-month period to 30 September 2015 is also reported as showing significant improvement over previous years, with gross profits for the period of some US$440.9 million attributable to "an increase in net sales and, to a lesser extent, our cost of goods increasing at a slower pace than our net sales".
>
> 77. ... but Miss Toube is right that there is **no analysis** by Mr. Smotlak or in the Fairness Opinion as to whether, and if so, to what extent, for example, the Parent might be able to raise substantial sums of money on the security of its net assets.
>
> 78. Faced with these points, Mr. Trower realistically did not suggest that the draft Explanatory Statement and **Fairness Opinion did contain a full analysis of all of the alternatives to the scheme. In my judgment they should do so**. I also consider that it should be made clear whether or not the authors of any fairness opinion provided to scheme creditors are prepared to accept responsibility to scheme creditors for that opinion.
>
> (emphasis added)

[46] So, insufficient analysis would be fatal. The only "analysis" relied on is a bare statement from Steve & Co (encl. 24 at paras. 4 and 5, pp. 340 to 341) that the scheme afforded better returns than in a liquidation. No detailed analysis is provided as to the estimated returns under the scheme and the estimated returns in a liquidation, and the basis for such estimates. This absence of analysis is similar in principle, to the deficiencies in Mr Smotlak's opinion in *Re Indah Kiat* (*supra*). In *Indah Kiat* (*supra*), Snowden J refused to grant the convening order but adjourned the convening hearing anticipating revisions to the fairness opinion.

[47] Without such an analysis, it would be difficult for a court to convene scheme meetings for the creditors to consider the scheme in question.

[48] This court could not possibly "act" by granting the convening and restraining orders when ASM has failed to even show any detailed analysis (within *Re Van Gansewinkel Groep BV* quoted in para. 45 above) to justify the assertion that the scheme provides better returns than in a liquidation. As stated in para. 43 above, it would be pointless to grant such orders in these circumstances. And it would be unnecessary to make a convening order to put a doomed scheme to the creditors; even though a liquidation scenario analysis is generally considered by the creditors, see *Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors* [2012] 9 CLJ 1071; [2012] MLJU 130. An arguable liquidation scenario analysis is necessary.

A Business Plan

[49] Thirdly, a business plan is essential to revive ASM. The existing business has long ceased; ASM has abandoned the Lingkaran Tower and had spent the last few years from 2018, bleeding creditors funds of about RM3.6 million as at 2022.

[50] It seems clear enough that by the scheme, ASM hopes to return as a going concern and its businesses revived, see paras. 13 and 14 above. So, there must be a business plan prepared by management and a financial adviser to show how ASM would return as a going concern.

[51] There is no such plan. This is a major flaw. There is no proposal with particulars as to how ASM is to be revived. Even though ASM is severely insolvent, ASM does not propose a fresh injection of new capital. There are no post scheme financial projections. There is no proforma post-scheme balance sheet showing that ASM will be balance sheet solvent after the scheme is implemented. There are no projected cash flows to show that ASM will be able to raise sufficient internally generated cash flow to meet its restructured debt and operating expenditure, see *Novabrite Lighting Sdn Bhd v. Emrail Sdn Bhd; Balaranee Construction (Proposed Intervener)* [2024] CLJU 2554; [2024] 1 LNS 2554; [2024] MLJU 2986 at para. 68. While I did not intend this statement in *Novabrite* to be a fixed rule of universal application, it remains a useful formula to show how rehabilitation may be achieved. Nevertheless, in my judgment, the scheme could not possibly be put before the creditors.

The Scheme

[52] The scheme is set out in ex D-1 of encl. 23 ('the scheme paper').

[53] The scheme is straightforward. It proposes that the trade creditors debts shall be repaid 100 sen in the Ringgit and the related party debts be paid 30 sen in the Ringgit. Payments are to be made by the first quarter of 2025.

[54] Payments are to be made from funds sourced from two cash streams:

(i) Stream 1: the sale of land and buildings was to raise between RM50 to RM70 million, see para. 5.1 of ex D-1; and

(ii) Stream 2: the collection of RM50 million from the repayment of debts by various related companies ("the related debtors"), at para. 5.2 of ex-D1.

[55] The creditors to be settled under the scheme total RM81.49 million in value and comprise (see para 5.3 of ex D-1):

(i) third party creditors of RM37.5 million; and

(ii) related creditors of RM43.99 million.

Managed Sell Down

[56] LM submits that the scheme is nothing more than a sale of its assets by a "self-liquidation", without a plan to revive ASM as a going concern, being the true objective of the s. 366 process. This, it is said, in an abuse of the s. 366 process and is illegal.

[57] With respect, I disagree. The s. 366 process may be used for a managed sell down of a company's assets. I have considered this option in *Novabrite* (*supra*) at para [86]:

> [86] ... a managed sell down of the company's assets to avoid expedited 'fire sale' prices resulting in reduced realisations for the creditors. However, in this scenario, there is no expectation that the company will be rehabilitated or revived; the managed sale will ordinarily end with the eventual winding up of the company. This type of restructuring has been considered and accepted conceptually in numerous cases, most recently by the Court of Appeal in England in *Re AGPS BondCo Plc Strategic Value Capital Solutions Master Fund LP And Others v. AGPS BondCo Plc* [2024] EWCA Civ 24' in the context of a scheme of arrangement. Snowdon LJ said:
>
> > 21. Importantly, the purpose of the proposed restructuring was not **to achieve the long-term survival** of the Group. The proposal was for a controlled wind down of the business and a more beneficial realisation of the assets of the Group than in an immediate formal insolvency. To that end the restructuring offered the Group some new short-term liquidity ... It was thought that this would allow the management of the Group time to implement a phased programme of asset disposals during 2025 and 2026, in what was hoped would be a recovering property market, leading to the distribution of **enhanced realisations to creditors** and the liquidation of the Group companies in 2027.
> >
> > (emphasis added)

[58] So, a managed sale or as counsel puts it a "self-liquidation", is permitted under s. 366. I therefore reject this objection.

Feasibility

[59] Secondly, LM submits that the scheme is not feasible. As stated above, in order to succeed on this ground, LM must show that it is not respectably arguable that the scheme is feasible or that it has no realistic prospect of success.

[60] To survive this challenge, there must be evidence to show that both Stream 1 and Stream 2 have, at least, a realistic prospect of being achieved, in that:

(i) the assets to be sold under stream 1 will realise RM50 million to RM80 million. There must, at the very least, be a reliable valuation of these assets to show that these assets will fetch these prices; and

(ii) that the related debtors have the financial capability to repay RM50 million of their debts due to ASM.

[61] Further, LM submits that ASM's creditors would only be paid under Stream 1 if ASM is successful in its sales. I agree that it is a "pay when paid proposal". In the event ASM fails to raise the proposed RM55 million, a binding scheme would mean creditors will have to wait indefinitely for a successful sale, without having the opportunity to wind up ASM.

[62] Although this suggests an unfair and unreasonable restraint, this is a commercial issue for the creditors to vote on at the scheme meetings. I also reject this challenge.

[63] There are, however, other more compelling reasons.

Stream 1 - Liquidating Assets

[64] The ability to raise RM50 to RM70 million on the sale of its assets.

The Empty Land and the Tower

(i) the valuation report of the empty land and the tower are dated 20 January 2016 and 30 November 2015 respectively. I agree with counsel for LM that these valuations are simply out of date and cannot be relied on. Furthermore, there are no forced sale values stated in either valuation, which would be a more realistic realisation value given the very short time prescribed to sell these properties as proposed by ASM, *ie*, by March 2025;

(ii) the Tower Block has been left abandoned since 2018. It has obviously deteriorated since 2018. In the absence of real evidence, I also accept counsel's doubts as to whether an uncompleted building abandoned for six years, is able to fetch the 'valued price' of RM26 million some six years ago; and

Lingkaran Maju Units & Office Units in Bandar Tasik Selatan

(iii) As to the five units at Lingkaran Maju and five units of office space in Bandar Tasik Selatan (Asset 2-11, encl. 2, p. 24), I accept the counsel's criticism that ASM has not obtained a valuation of any kind and merely ascribed an unverifiable sale value.

[65] Further, there is no evidence of any offer to purchase any of these assets to realise the RM55 million.

[66] In the circumstances, I find that there is insufficient evidence to show that the feasibility of ASM's proposal to liquidate its land and buildings to raise the sum of RM55 million, is respectably arguable. Particularly, when completion is for slated mid-March 2025.

Stream 2 - Recouping Debts From Related Debtors

[67] Stream 2 payments are based on ASM recouping its debts from Related Debtors (see scheme paper at para 5.2).

[68] First, the counsel for LM correctly notes that ASM would only be able to recoup its debts from the related debtors when they complete their ongoing respective restructuring exercises.

[69] Indeed, ASM has failed to disclose any particulars of the status of the alleged related debtors or when their restructurings will be completed. The status of these restructurings is important information which should have been disclosed.

[70] Secondly, there is no evidence of the solvency of or the financial ability of the related debtors to repay ASM, in particular, ASM Development (KL) Sdn Bhd, which owes approximately RM90 million or 71.89% of the total RM125 million owed to ASM. There is no evidence that it or the related debtors are solvent and are legally able to pay the RM50m ahead of the claims of their own creditors.

Priority Creditors Prejudiced

[71] In a liquidation, the liquidator must adhere to the priority payments under s. 527(b), (e) and (f) of the 2016 Act. Priority claims in a liquidation include employee salaries, EPF and LHDN. However, there is no proposal to settle ASM's priority debts.

[72] It is accepted that ASM may choose which creditors it wishes to compromise, see *Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals* [2014] 1 CLJ 161). Under the scheme, ASM has proposed that related party creditors be paid 30% of their claims by March 2025. There is nothing in the scheme providing for settlement of the priority debts. The priority debts will be left outstanding.

[73] This raises a more acute problem. Without being subject to the scheme, the priority debts must be settled in full post scheme. These are substantial debts and without showing how the priority debts will be settled, ASM may well be insolvent post scheme. No court will sanction a scheme on that basis, see para. 78 below. It follows that the priority creditors run the risk of receiving nothing and ASM failing post scheme.

[74] Lastly, LM claims that the scheme is an abuse and proposed for a collateral purpose, *ie*, to stay all three winding-up petitions currently pending. The predominant for the scheme, it is said, is not meant to compromise the debts of the scheme creditors nor to revive ASM's business.

[75] There is some evidence to that effect. But given my findings on other issues, I need not go that far.

Conclusion And Orders

[76] I find that in all the circumstances the scheme should not be put to the creditors.

(a) first, there is insufficient disclosure to the court to persuade me to act. There is no full and frank disclosure of ASM's financial position. There is no business plan to show how ASM could be revived. There is no proper liquidation scenario analysis that shows that it is at least arguable, that the scheme is a better alternative for the creditors than a liquidation; and

(ii) secondly, it is not respectably arguable that the scheme is feasible, nor does it have a reasonable prospect of being sanctioned under s. 366(4).

[77] Given ASM's severe financial distress and the absence of an extant scheme which feasibility is respectably arguable, ASM would probably be considered as irreversibly insolvent, with no light at the end of the tunnel. In the interests of its creditors, ASM should be wound up, see *Novabrite* (*supra*) at para 178.

[78] To allow matters to remain would mean that ASM will continue to burn whatever cash or assets that remain, which in reality belongs to the creditors. And more importantly, it would be against commercial morality and public policy to sanction a scheme of a hopelessly insolvent company, thus allowing it to continue trading and to incur more debt, see *Sri-Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106; [1990] 2 MLJ 31 at 35.

[79] Accordingly, I dismiss prayers 1, 2, 3, 4, 5, 6 with respect to the convening of the scheme meetings.

[80] In the absence of a realistic scheme, I also dismiss prayer 7 for a restraining order, being ancillary relief to protect the company pending implementation of a genuine scheme. Prayer 8 is also dismissed for being superfluous.

[81] As Mr Leong is not asking for costs, I make no order as to costs.